



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Succession Cause 775 of 1994**

**IN THE MATTER OF THE ESTATE OF ASHIMOLELA MADEGWA DECEASED**

**A N D**

**FESTUS MADEGWA ASHIMOLELA & GODWIN A. IMBOVA .....PETITIONERS**

**V E R S U S**

**ZEMBETER AKALA SAMUEL .....OBJECTOR**

**R U L I N G**

Shimolela Madegwa, the deceased in this cause, died on 28.11.77. He left two widows, Lufina Lucheche Ashimolela, (the 1<sup>st</sup> widow) and Khamayi, (the second widow). Both are alive. The 1<sup>st</sup> widow had three children, Zembeter Akala Samuel, Tom Imbova and Rebecca. Both Tom and Rebecca have died. Tom left an heir, G A but Rebecca had no child and was not married.

The 2<sup>nd</sup> widow, Khamayi, has only one child namely, F M A.

The contest for inheritance of the estate of the deceased is between Zembeter Akala Samuel on the one hand and Godwin Ashimula Imbova and Festus Madegwa Ashimolela on the other hand. Zembeter Akala Amakwa (the Objector) maintained in these proceedings that the deceased left two parcels of land, namely Isukha/Shitochi/1507 and Isukha/Shitochi/14903 and that the deceased had given to and settled Festus Matekwa Ashimolela (the 1<sup>st</sup> Respondent) on land parcel No.1507. The latter continues to live on that land to date. The Objector had no objection to this because, according to her that land was intended for the children of the house of Khamayi, the 2<sup>nd</sup> widow and as the 1<sup>st</sup> Respondent was the only child in that house, he was according to the Objector entitled to inherit it.

According to the Objector, land title No. Isukha/Shitochi/1493 was for 1<sup>st</sup> house of Lufina Lucheche Ashimolela, the 1<sup>st</sup> widow, and should be shared between her and her dead brother's son, G A (2<sup>nd</sup> Respondent).

The Objector called two witnesses to support her case, namely Alfred Imbuka Masitia, a retired Assistant Chief of Shitochi Sub-location and Charles Shisundi, a village elder of the area, both of whom testified that land title No.1493 should be inherited by the Objector and her nephew, the 2<sup>nd</sup> Respondent, while their step brother, the 1<sup>st</sup> Respondent, should inherit land title No.1507.

The 1<sup>st</sup> Respondent admitted in his evidence in court that both land titles Nos. Isukha/Shitochi/1493 and 1507 belonged to the deceased and that the deceased had given to him land title No. Isukha/Shitochi/1507 when he was alive as his share of inheritance. He contended that the other parcel No. Isukha/Shitochi/1493 should go to the 2<sup>nd</sup> Respondent, his deceased's step brother's son. He was objectionable to the Objector inheriting parcel No. Isukha/Shitochi/1493 firstly because she was a married woman and, therefore, not entitled to inherit under Luhya Customary law and secondly because her intention was to sell it. He was unable, however, to adduce any evidence to show that the Objector was married. Godwin Ashimolela, the 2<sup>nd</sup> Respondent, also contended that the Objector is a married woman and for that reason could not under the Luhya custom, inherit land parcel No. Isukha/Shitochi/1493. He alone, he said, was entitled to inherit it, while the 1<sup>st</sup> Respondent alone was entitled to inherit parcel No. Isukha/Shitochi/1507. Like the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent had no evidence to show that the Objector was a married woman.

Land No. Isukha/Shitochi/1493 measured 0.9 of a hectare. It is in Kakamega. Land parcel No. Isukha/Shitochi/1507 measures 0.8 of a hectare and is also in Kakamega. It was not clear from the evidence of the parties when the land parcel No. Isukha/Shitochi/1507 was transferred to the name of the 1<sup>st</sup> Respondent as its proprietor and legal owner. However, it was admitted that it originally belonged to the deceased who gave it to the 1<sup>st</sup> Respondent as the latter's share of inheritance.

The 1<sup>st</sup> Respondent has no claim therefore to the estate of his late father, the deceased, and does not claim to be entitled to any part of land parcel No. Isukha/Shitochi/1493 which was registered in the deceased's name as at the time of his death.

The only heirs to the estate of the deceased are the 2<sup>nd</sup> Respondent, Godwin Ashimolela and his aunt, the Objector, Zembeter Aloka Samuel. It was contended that the latter was a married woman and therefore could not inherit. The Luhya custom which was cited as the authority for the proposition that Luhya married women are not allowed to inherit has no place in Kenya's modern society as it is repugnant to justice. It is also discriminatory because if married sons can inherit there is no reason or rhyme why married daughters cannot also

inherit. This customary tradition was practiced in the days of old when landed property was invariably always ancestral land and need then existed to ensure that such land was retained in the patriarchal family tree so as to be handed down as patrimony to sons. That custom is out of step with modernity as it does not have regard to gender parity. It does not also take cognizance of the fact that the reasons why the custom was maintained have largely ceased to exist in modern state. I declare this tribal custom discriminatory and repugnant to justice and fairness and quite out of step with modern social ethos. It is my finding that the heirs to the estate of the deceased who are entitled to succeed to the land No. Isukha/Shitochi/1493 are the Objector and the 2<sup>nd</sup> Respondent.

As the deceased died intestate in 1978, before the coming into force of the Law of Succession Act Cap 160, it is the customary law to which he died subject that governs succession to his property but administration of his estate will be in accordance with the provisions of the Law of Succession Act.

I have hereinabove declared the customary law and practice of excluding married Luhya women from inheritance of their father's land as unconstitutional, repugnant and inapplicable. Accordingly, the land known as Isukha/Shitochi/1493 shall be inherited by the Objector and the 2<sup>nd</sup> Respondent and I order that they shall take in equal shares.

The 1<sup>st</sup> widow, Lufina Lucheche Ashimolela, shall have life interest in the said land. The life interest of the 1<sup>st</sup> widow will not be safeguarded nor will the order have meaning unless the land remains in the hands of the heirs. Accordingly, I order that there shall be registered against land parcel No. Isukha/Shitochi/1493 an inhibition order to prevent registration of any dealing in the said parcel. Each party shall bear its own costs.

*Dated, signed and delivered at Kakamega this 24<sup>th</sup> day of March, 2006.*

G. B. M. KARIUKI

J U D G E